

DAVID Y. IGE
GOVERNOR



KATHRYN S. MATAYOSHI
SUPERINTENDENT

**STATE OF HAWAII
DEPARTMENT OF EDUCATION
P.O. BOX 2360
HONOLULU, HAWAII 96804**

Date: 03/31/2015
Time: 09:35 AM
Location: 016
Committee: Senate Judiciary and Labor

Department: Education

Person Testifying: Kathryn S. Matayoshi, Superintendent of Education

Title of Bill: HB 1090, HD2, SD1 RELATING TO EMPLOYMENT AGREEMENTS.

Purpose of Bill: Prohibits noncompete agreements and restrictive covenants that forbid post-employment competition for employees of a technology business. Effective 07/01/2112. (SD1)

Department's Position:

The Department of Education supports this measure. As one of the largest technology employers in the state, finding talented, experienced individuals to fill our openings is a challenge for a number of reasons. One being that there appears to be a lack of available candidates either qualified or available to work in this state.

On occasion, we have had extremely qualified consultants/applicants express the interest in positions at the Department. However, because their noncompete agreements prevent them from seeking subsequent employment at organizations their current employer does business with, they must effectively eliminate themselves from consideration. Some of these individuals work for large mainland technology companies and have very specialized skills, or might possibly be here on assignment, but have a strong desire to either remain as Hawaii residents or become Hawaii residents.

Most noncompete agreements effectively prevent an individual from working in any technology capacity at an organization which their employer competes or does business with. For employees of large consumer oriented companies which do business with nearly everyone, a noncompete agreement tends to eliminate nearly all viable options for employment within the state. This encourages technology workers to move out of state to secure employment in their chosen field, thus reducing the available candidate pool to fill our most experienced positions.

We believe that limiting the use of noncompete agreements would help to increase the pool of technology employees in the state of Hawaii, and encourage innovation and growth in the technology industry as a whole.

Written Statement of
ROBBIE MELTON
Executive Director & CEO
High Technology Development Corporation
before the
SENATE COMMITTEE ON JUDICIARY AND LABOR
Tuesday March 31, 2015
9:35 a.m.
State Capitol, Conference Room 16
In consideration of

HB1090 HD2 SD1 RELATING TO EMPLOYMENT AGREEMENTS.

Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee on Judiciary and Labor.

The High Technology Development Corporation (HTDC) respectfully **Supports** HB1090 HD2 SD1 relating to employment agreements.

HTDC comments that the bill favors employee mobility which can provide benefits of retaining spin-off companies and entrepreneurial employees within the state. HTDC comments that companies utilize nondisclosure agreements to protect its intellectual property and corporate knowledge. HTDC also comments that eliminating all non-compete agreements may not be advantageous for some small technology businesses to protect its business strategy, and customers.

Thank you for the opportunity to offer these comments.

Cinthia Miller
Owner

O&A Consulting LLC
Honolulu, HI 96816

TESTIMONY IN SUPPORT FOR SB 1090 HD2 SD1

SENATE COMMITTEE ON JUDICARY AND LABOR

Tuesday, March 31, 2015, 09:35 AM

State Capitol Conference Room 016

Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee on Judiciary and Labor,

I strongly support SB 1090 HD2 SD1 Technology Employment Covenants or Agreements. As an IT consultant with more than 15 years of working with companies in Hawaii, I have experienced first-hand the negative impacts and fear that non-competition agreements generate for someone who is seeking employment locally.

I started my career in Hawaii working for a small technology startup. I was later offered a job with Microsoft in Hawaii. I was laid off in 2010 and was contractually restrained from seeking employment with most businesses in Hawaii for 1 year through their non-competition agreement, which also applied to businesses outside of Hawaii since they were nationwide. Although my old employer did not enforce said non-compete agreement, I was under continual fear that it would be imposed and I would be forced to move to another state or temporarily change my trade for the 1 year period. In the IT field, 1 year of non-practice heavily hinders your ability to keep up with new technologies and maintain your marketability in a fast-changing industry. Non-competes not only vastly limits employment options in Hawaii technology employees, but also prevents progress in building the pool of talent that is already inadequate to begin with.

I was offered several employment opportunities by existing Hawaii clients that I consulted for through Microsoft. The solicitations of employment by these clients were also prohibited and could have been legally enforced. Under these confining circumstances, I subcontracted to my existing client, Hawaii's leading health insurance company, through a new employer, a small, local consulting firm. This new employer also required a non-competition agreement. Working under two non-competes, I was continually worried that lawful action could be taken against me at any time during the 1 year period.

In 2012, I first experienced the negative impacts of an enforced non-compete when one of my old clients, Hawaii's biggest airline company, requested my services for specific IT needs that very few local consultants specialize in. Under the non-competition agreement with my new employer, I was not able to practice IT consulting outside of their employment, even if the client was my own to begin with. The agreement required me to start any new work by subcontracting through them. I was told that in order to conduct IT consulting independently without any enforcement of their non-compete, I would need to "make them whole". After many uncomfortable conversations and tedious negotiation, my new employer allowed an exception with the new airline client, opening up one small hole in the non-compete but leaving lots of room for potential "make them whole" situations in the future.

This is no way to do business in Hawaii, where there is a limited pool of employers and employees. Throw in restraints on which of those businesses you can work for and you're left with almost no hope in finding stable employment. For employers looking to fill their positions with IT specialists, soliciting even laid-off staff locked into non-competition agreements puts their companies at risk. Outsourcing their work offshore becomes an attractive option.

Supporting the SB 1090 HD2 SD1 bill will support local businesses and employees in Hawaii and solidifying a path for growth in Hawaii's IT industry. Please help us keep our local talent and provide us an autonomous and cultivating environment to work in.

Thank you for the opportunity to testify.

Cinthia Miller

Owner

O&A Consulting LLC

REGULAR SESSION OF 2015

COMMITTEE ON JUDICIARY AND LABOR

DATE : Monday, March 31, 2015
TIME : 9:35 AM
PLACE : Conference Room 016
State Capitol
415 So. Beretania Street

TESTIMONY OF PACRIM MARKETING GROUP, INC. & PRTECH, LLC IN OPPOSITION TO SB 1090, HD 2, SD1

On behalf of PRTech, LLC., and PacRim Marketing Group, Inc. as an advocate for small business, we would like to present testimony opposing SB 1090, HD 2, SD1. RELATING TO EMPLOYMENT AGREEMENTS. Prohibits non-compete agreements and restrictive covenants that forbid post-employment competition for employees of a technology business.

First, I would like to introduce myself. My name is Dave Erdman and I am the President and CEO of PacRim Marketing Group, Inc. and PRTech, LLC. I founded PacRim 25 years ago to help bridge cultural gaps and gain market entry for companies in Hawaii and North America seeking to do business in Japan, China, Korea, and other Pacific Rim regions. This vision and ability to help Hawaii's businesses gain market entry into Asia and to embrace change in the marketplace—especially the emerging AIT (Asian International Traveler) markets from Korea, China, and Taiwan—have positively impacted Hawaii's largest industry (tourism) and contributed to the firm's growth.

In 2003, with a client pushing us to help them develop a type of system that Asian travelers could use to book hotel rooms. We began development on a hotel booking engine, through a new company founded to specialize in technology and on-line marketing, PRTech, LLC. **Both companies have grown organically, with NO outside investment.**

PRTech's flagship product today known as MyRez 4.0 is a multilingual, online reservations booking system which works as a booking engine on a hotel's website displaying information in Japanese, Korean, Simplified Chinese and/or Traditional Chinese. Travelers are allowed to complete reservations in their own language, including submitting questions and special requests. MyRez then communicates all reservation-related requests between hotels and travelers, providing an optimal online user environment.

I am very proud of the recognition our companies have received over the past years. In 2014, the U.S. SBA (Small Business Administration) recognized me on behalf of our companies, as the “Small Business Person of the Year” for the State of Hawaii, recognized for: developing an outstanding growing business with increasing sales; innovations in products and services; responsiveness to adversity; and for his companies’ contributions to the travel and retail industry as well as for supporting community-oriented volunteer activities and monetary contributions.

PRTech, LLC. was named one of Hawaii’s fastest growing technology firms for four consecutive years, from 2008 to 2011.

This past Friday Pacrim Marketing Group, LLC and PRTech, LLC was recognized as one of the “Best Places to work in Hawaii” in the small business category, **voted by our employees, who all have non-compete agreements.**

Both companies have utilized a non-compete agreement of a number of years. This requirement was prompted by several instances where management employees armed with delicate and potentially damaging proprietary information have left the company to join other competing companies, created their own companies offering competitive services and products, or recruited and hired key employees of both companies. As a result, PacRim Marketing Group and PRTech have suffered financial setbacks resulting from the loss of actual and potential revenue, the loss of key staff members and the concomitant "brain drain," the cost of litigating such violations, and the misuse of goodwill created by both companies with their clients. This litany of legal and financial pitfalls underscores a key point in support of non-compete and confidentiality agreements. Both are good, but when it comes to providing protection to the employer, **they don't offer a full measure of protection.**

The use of a non-compete agreement would prevent such future episodes from becoming a financial nightmare. Otherwise, PacRim Marketing Group and PRTech will be faced with the dilemma of being left with no legal option to protect its future proprietary and financial interests. The argument to continue use of a non-compete agreement is obvious on its face. First, the agreement protects the employer's legitimate business interests by preventing former employees from gaining an unfair advantage in future competition and by protecting confidential information in a highly competitive market. Second, the agreement is reasonable because it results in little, if any hardship to the former employees and the public. Third, the agreement imposes time and territorial limits that are no greater than necessary to protect the employer's business interest. Lastly, the goodwill developed by an employer with its clients is a critical asset and the use of a non-compete agreement prevents former employees from capitalizing on that goodwill.

Being a small business in the State of Hawaii, in a specialized niche market staff leaving the company has high ramifications. The learned skills and techniques, business best practices are always taken with them.

- a. Having staff work for client

- b. Having staff work for a competitor
 - c. Having staff start their own business
- 2. As a small business it is difficult to find/retain tech people in Hawaii
 - a. We invest in work visas (H-1B – Green cards) and bring tech people from outside country
 - b. Recruit from the Mainland – paying steep headhunter fees
 - c. We have had big companies poach on recruited and trained staff with their high salary and benefits packages
- 3. Many say that non-competes prevents economic growth. There are over 105,000 small businesses here in Hawaii. For small businesses this bill will hinder growth and thus affect our economy. Here in Hawaii a lot of” tech companies” fall under the small business classification and try to develop and survive in the current market. It seems like a never ending circle if we can’t attract employees to Hawaii because of the non-competes. When we do limit or remove non-competes we won’t attract employees because they will go and work for large scale business who have big compensation packages and whose corporate headquarters may not even be in Hawaii.
- 4. Our non-compete agreements are written to protect the company’s investment in its training and development of good employees. We have not prohibited the movement of employees from company to company; however we have tried to protect our companies’ well-recognized interests for a reasonable period of time and geography
- 5. This vote will likely have impact on potential other industries forbidding non-compete agreements as well, further damaging our opportunities and other small businesses and organizations opportunities to survive, where we need to thrive and grow.
- 6. Headhunters, human resource talent specialist, and human resource managers’ at large companies don’t want non-compete so they can have a larger pool of talent and candidates to fill their openings.
- 7. Our opportunities have been to use off-shore talent, from India or mainland, but that does not help Hawaii. We have focused on having our team and headquarters in Hawaii.

I suppose that every argument can be counter argued. For PRTech and for small businesses that will fall in the “Technology business”, reducing non-compete timeframe will counter balance everything it has tried to build. It will be harder to find talent because they are all being recruited for the large businesses. Eliminating non-competes entirely will be a devastating blow to the growth and survival of many small businesses here in Hawaii.

I think that the intent of the bill was to try and limit the time frame of the non-competes but perhaps it should look to set some limitations to how much an individual can be limited. i.e. can't work for a competitor/customer/for the same type of industry vs. another organization in Hawaii – more reasonable and specific to the business vs so broad and general.

In response to those that say that having these bills passed with “help to stimulate the technology industry”, I do not agree. I do believe that this bill will only add to the constant churn for recruiters and more cost to companies in general. As business owners we all like to keep our turnover to a minimum because of the cost involved in recruiting, training, and acclimation, this will encourage the tech skilled to move around more so. It's not good for stimulating growth here in our island state. Supporting this bill, as written, will not help stimulate the “tech” sector.

I am surprised by the lack of opposition to this bill and perhaps it is not the lack of opposition but the lack of information and resources that most small businesses have. Small businesses lack the personnel and funding to hire a full time lobbyist or have a legal department following what is going on in the legislature. We actually read about the bill in the paper. We wish we could have been part of this opposition earlier in the process when the bills were first presented.

We urge the members of the committee to hold or defer this bill. If any committee members or staff has questions regarding his testimony, please feel free to e-mail or call me at 808-479-6895 via email derdman@pacrimmarketing.com. Thank you very much for your time and considerations.

Dave Erdman | President & CEO
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SENATE COMMITTEE ON JUDICIARY AND LABOR

Tuesday, March 31, 2015, 09:35 AM

State Capitol Conference Room 016

Aloha Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee on Judiciary and Labor

I am writing in strong support of SB 1090 HD2 SD1 that would eliminate restrictive post-employment non-compete agreements on employees of technology businesses.

Having worked in Hawaii as an IT consultant on several projects, I have both witnessed events and have heard stories of how these agreements have forced other professionals in my industry to shy away from doing business on the islands. Honest working people with talents in this industry are fortunate to have many options for contracting and permanent employment positions all over the globe. These types of covenants certainly make the choice of working in Hawaii a less desirable one. Certainly, people in the technology industry are expected to provide outstanding deliverables for an agreed upon salary. However, expecting those same people to not be able to continue to provide for their families after that engagement is complete goes against every basic hard working principle this country was founded upon. Hawaii is a uniquely beautiful place full of rich heritage and strong principles that should not be shroud in the negative light of these types of intimidating corporate practices. Open competition and fair trade practices has always provided a solid foundation for growing an economy and harvesting talent. I sincerely hope you will support this bill to provide that type of foundation allowing for Hawaii's continued growth in the technology industry.

Mahalo,

William Kirby
President
Radical Synergies LLC

Jeffrey D. Hong
TechMana LLC
Honolulu, HI, 96813

Senate Committee on Judiciary and Labor

Tuesday, March 31, 2015, 09:35 AM
State Capitol Conference Room 016

Aloha Chair Keith-Agaran, Vice-Chair Shimabukuro, and Members of the Committee:

Thank you for the opportunity to testify on SB1090 HD2 SD1. This legislation provides many leveraged benefits across the state as it helps to build our technology community:

- **Increased Revenue for the State** - Contract staff typically pay state income taxes in the jurisdictions from where they are staffed. New Hawaii employees will pay Hawaii State taxes.
- **Grow Innovation Community** - The innovation community has a chance to grow because they are free to work in their field in Hawaii. The best will not be driven from the state.
- **Lower costs for businesses** - Costs of local talent is significantly lower than paying for the time and expenses of external resources. This will lessen the cost of the cycle of training transient staff only to see them leave and need to train new transient staff.
- **Attracts Investments** - The ability to keep innovation talent to spawn communities of expertise will make Hawaii a better place to make investments.

The bill has been gaining support as awareness has been raised on its positive effects to Hawaii.

- The **Editorial Board of the Star Advertiser** recommends "Giving Tech Workers Contract Freedom"
- The **Hawaii Venture Capital Association** and the **New England Venture Capital Association** have testified employee mobility makes Hawaii a better place to invest.
- Local non-technology organizations like Hawaiian Airlines and the DOE see an opportunity to staff their technology positions or have a wider pool of local talent.
- **"Technology businesses"** like my own, PACXA, and others. We see providing a stable environment for technology professionals as a way to grow-the-pie of technology opportunities in Hawaii. This strategic advantage more than offsets the loss of any individual employee who would want to leave our employment from this law. We are willing to compete for the best talent and gain a larger pool of talent.

We have worked through the drafting process with input from Hawaiian Telcom, the Hawaii Association of Broadcasters, and the various committee hearings for an amended bill with a narrow scope that still delivers a boost across Hawaii's industries. Only a small slice of Hawaii businesses are directly affected by this legislation. They must obtain a majority of their gross income from development of software or information technology. Seeding our State with these technology professionals will help reduce costs across the State for businesses dependent on technology and levels the legal playing field between Hawaii and California. Hawaii can now stand as an alternate choice to California when people seek to escape an odious noncompetition agreement from the mainland.

Hawaii can become another ***"City of Refuge"*** for innovation.

Thank you for the opportunity to testify.

Mahalo,

A handwritten signature in black ink, reading "Jeffrey D. Hong". The signature is fluid and cursive, with the first name "Jeffrey" being the most prominent part.

Jeffrey D. Hong
Chief Technology Officer
TechMana LLC

Strong Support HB 1090 HD2 SD1

Welcoming Technology Businesses

Hawai'i courts have enforced statewide, three year employment covenants not to compete. These provisions force our citizens to leave Hawai'i in order to continue advancing in their fields. Although many professions would benefit from the elimination of covenants not to compete, the unique damage to Hawai'i from enforcement of these contracts to technology professionals merits special consideration.

Protecting intellectual property is vital to growing Hawaii's innovation economy. The adoption of the Uniform Trade Secret Act in Hawai'i as **HRS §§ 482B-1 through 482B-9 (2011)**, provides a means for protecting the legitimate trade secrets of innovation businesses. This approach has proven effective in California to protect the secrets of Silicon Valley and allow its technology industries to thrive. Covenants not to compete are an obsolete approach to protecting trade secrets. It drives local technology innovators from Hawai'i and forces businesses into expensive searches for talent from outside the State.

Advocating for HB 1090 HD2 SD1 has brought together a broad coalition of support for eliminating an avoidable cause of brain drain from our State. We ask your positive consideration of HB 1090 HD2 SD1.

Mahalo,

A handwritten signature in black ink, appearing to read "Jeffrey D. Hong".

Jeffrey Hong
Chief Technology Officer
Techmana LLC

HB 1090 HD2 SD1 Supporters

Technology Industry:

Gordon Bruce – CEO, Pacxa
Jacob Buckley-Fortin – CEO, eHana LLC
Matthew Douglass – Co-Founder, VP Platform, Practice Fusion
Jay Fidell – Founder, ThinkTech
Cort Fritz – Principle Program Manager, Microsoft
Jeffrey Hong – Chief Technology Officer, Techmana LLC
Meli James – President, Hawaii Venture Capital Association
Kiyoshi Kusachi – Senior Manager, Hawaiian Airlines
William Kirby – President, Radical Synergy LLC
Chris Lee – Motion Picture Producer, Founder and Director, ACM System
Burt Lum – Executive Director, Hawaii Open Data
Sam Martindale – Managing Partner, Architecting Innovation
Cinthia Miller – Owner, O&A Consulting
Phillip Moore – VP IT, Hawaiian Airlines
Jim Takatsuka – Hawaii Account Executive, Microsoft
Spencer Toyama – Founder, Sudokrew LLC
Edward Pileggi – Owner, Lunasoft LLC
William Richardson – General Partner, HMS Hawaii Management Partners
Aaron Schnieder – Founder, Church Office Online
John Vavricksa – Program Director, RTI International
CynthiaAnn (C.A) Webb – Executive Director, New England Venture Capital Association

Academic Faculty:

Professor Hazel Beh - University of Hawaii, Richardson School of Law
Professor Matt Marx – MIT, Sloan School of Management

Government:

Steven Levinson - Associate Supreme Court Justice, State of Hawaii, Retired
Mark Wong - CIO, City & County of Honolulu
David Wu - CIO, State of Hawaii Department of Education

Attorneys:

Stanley Chang
Nathan Kinney
Rock Tang

Ryan Hew
David Simons

** All individuals are expressing their personal views and not representing the views of their associated organizations. The views of their organizations are expressed in submitted testimony.*

From: [Caroline Huang](#)
To: [JDL Testimony](#)
Subject: HB 1090 -- support for noncompete reform
Date: Thursday, March 19, 2015 5:07:29 AM

Dear Members of the Hawaii State Legislature:

I am writing in support of HB 1090, which proposes employee noncompete contract reform for the technology business sector in Hawaii. I am actively working toward noncompete reform in my home state of Massachusetts.

After finishing my PhD in electrical engineering (specializing in speech science and technology) at MIT in 1991, I signed a very restrictive noncompete at my first job. I had no choice because all employers I interviewed with required noncompetes. When I decided to leave after three years, I was required to stay out of my field for one year. I took a "career detour" which ultimately kept me out of my field for two years. In retrospect, the lost momentum of those two years at the beginning of my career had lasting effects on my career path. I never again had a management position, and my salary is probably lower than it would have been had I taken a straight path. Many factors affect a career path, but a former employer's restriction on where I can work should not be among them.

Ideally, all fifty states would have a ban on noncompetes like California's. Hawaii already has the advantages of stunning natural beauty and relative proximity to California/Silicon Valley and Asia. If Hawaii banned or at least limited noncompetes, there would be yet another reason for high-tech experts to migrate to or stay in the Aloha State. On a human level, we would all admire Hawaii for being a leader in recognizing and respecting employees' rights.

On a personal note, I have visited your beautiful state a few times, and each time I think about how my entrepreneur husband and I might make Hawaii a bigger part of our lives. With noncompete reform, an active "retirement" in Hawaii to start a new tech company might be a realistic option.

Thank you for considering my testimony.

Sincerely,

Caroline B. Huang

March 30, 2015

Aloha Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee on Judiciary and Labor,

I am writing in strong support of **HB1090 HD2 SD1** – a bill to invalidate restrictive employment covenants or agreements. Research has shown that restrictions on employee mobility can inhibit innovation in high-velocity industries like information technology (IT) and can lead to an exodus of skilled workers (and their important knowledge) to other regions.

I have been a part of Hawaii's IT sector for 25 years working for Apple, Sun Microsystems, and currently as the Enterprise Account Manager for Microsoft. I testify today in a personal capacity. Over this time, I have seen Hawaii companies struggle to find enough skilled IT workers to help them best leverage their investments in information technology. Although there are certainly many skilled technology workers here, we have never approached the critical mass of IT professionals needed to drive our businesses forward.

When compared to their mainland peers, many Hawaii companies are far behind in their use of information technology, simply because the skills to deploy hardware and software are difficult to find. It is not uncommon to find companies here running on software that is more than 10 years old – an eternity in the IT world. The need and the desire to modernize are certainly there, but because skilled labor is difficult to find, many companies simply make do with outdated technology.

When Hawaii businesses do decide they need to push forward and innovate, they are often forced to look outside the state, which of course means shipping dollars to the mainland and beyond. Two recent projects that I have been involved with illustrate this point well:

- A large local company needed to redesign and rebuild their company web site, not just to improve their ability to market their products, but also to serve as a platform to transact hundreds of millions of dollars' worth of business. Using the internet allowed them to increase their reach, reduce their costs, and accelerate their growth. Their finished project allowed them to reach their goals, but the site was designed and built almost exclusively using out-of-state contractors.
- Another large local company needed to build a new system for managing their customer activity. The new system would allow them not only to keep track of all customer interactions, but reveal new sales opportunities and help the company identify which products were successful and which were not. The system would allow the company to operate more efficiently (quicker, higher quality interactions) and effectively (the right product to the customer most likely to buy). This project was completed entirely by out-of-state contractors.

In both examples, the companies have strong ties to the Hawaii community and would very much have preferred to hire local and keep their spending in Hawaii (expenditures on the customer management project were well over \$1M and those for the web site were triple that). But in each case, the appropriate skills were not available locally and the companies were forced to import the technology skills required to meet their needs.

Of course, the paucity of skilled IT workers in Hawaii is not solely due to impediments to employee mobility. But in the technology industry, removing any restriction on employment would serve as an important step towards catalyzing growth in a sector that can have broad, meaningful impact in our community.

Thank you for your consideration,

A handwritten signature in blue ink, appearing to read 'Jim', with a large loop at the bottom and a small flourish at the top.

Jim Takatsuka
Enterprise Account Manager
Microsoft Corporation



SENATE COMMITTEE ON JUDICIARY AND LABOR

Tuesday, March 31, 2015

Greetings Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee on Judiciary & Labor:

My name is Matt Marx. I am the Assistant Professor of Technological Innovation, Entrepreneurship, and Strategic Management at the MIT Sloan School of Management. My research, supported by others in my field, concludes regional “brain drains” are directly related by public policy affecting employee mobility. I strongly support HB 1090, HD2 SD1, as a means for Hawaii to retain its top talent.

2014 marked an inauspicious anniversary: 600 years since the first employee non-compete lawsuit was filed. It was in northern England, in the very high-tech industry of clothes-dyeing. An apprentice was sued by his master for setting up his own clothes-dyeing shop in the same town in 1414. The judge, appalled that the master would try to prevent his own apprentice from practicing his profession, threw out the case and threatened the plaintiff with jail time.

Much has changed in 600 years, but employee non-compete agreements still bear painful resemblance to medieval practices. As a professor at the MIT Sloan School of Management, my research focuses on the implications of non-competes for individuals, firms, and regions. I am not alone in this effort; during the last ten years, several scholars have contributed to a body of work including

- Toby Stuart of the University of California at Berkeley
- Olav Sorenson of Yale University
- Mark Garmaise of UCLA
- Mark Schankerman of the London School of Economics
- Lee Fleming of the University of California at Berkeley
- Jim Rebitzer of Boston University
- April Franco of the University of Toronto
- Ronald Gilson of Stanford University
- Ken Younge of Purdue University
- Sampsa Samila of the National University of Singapore
- Ivan Png of the National University of Singapore

My work, as well as that of those of these scholars, has almost universally found non-competes to be detrimental to individual careers and regional productivity. Non-competes, do not, as is often claimed, spur R&D investment by companies. Just to summarize a few points:



- Although it is frequently claimed that non-competes are usually only a year in duration, a survey I conducted of more than 1,000 members of the IEEE engineering organization revealed that fully one-third of these are longer than one year and 15% are longer than two years.
- An article of mine in the American Sociological Review reveals that firms rarely tell would-be employees about the non-compete in their offer letter. Nearly 70% of the time, they wait until after the candidate has accepted the job and, consequently, has turned down other job offers. Half the time the non-compete is given on or after the first day at work. At this point it is too late for the employee to negotiate—indeed, I found that barely one in ten survey respondents had a lawyer review the non-compete.
- Several articles including my own with Lee Fleming and Debbie Strumsky in Management Science, by Jim Rebitzer and two Federal Reserve economists in the Review of Economics and Statistics, by Mark Garmaise in the Journal of Law, Economics, and Organization find that non-competes make it difficult for employees to change jobs. Instead, workers are trapped in their jobs with little possibility of moving elsewhere.

In the remainder of my testimony I wish to comment on the “chilling effect” non-competes can have regardless of the best intentions of judges and the possible implications for regional economic performance.

Jay Shepherd of the Shepherd Law Group reports that there were 1,017 published non-compete decisions in 2010. The Bureau of Labor Statistics reported that there were 154,767,000 workers in the U.S. as of June 2010. If the effect of non-competes were limited to the courtroom, simple math would suggest that 0.0007% of workers were affected by non-competes. Yet data from my IEEE survey indicate that nearly half of engineers and scientists are required to sign non-competes (including states where they are unenforceable). Why are 50% of workers asked to sign non-competes when barely a thousandth of a percent of them ever involve a court case? It is because of *the chilling effect*—because non-competes affect worker behavior even in the absence of a lawsuit. Thus it is essential to account for and anticipate how non-competes affect workers outside the courtroom.

In my own research including interviews with dozens of workers, I have rarely if ever come across an actual lawsuit. However, I have seen several instances where workers have taken a *career detour*, leaving their industry for a year or longer due to the non-compete. They took a pay cut and lost touch with their professional colleagues—not because they were sued, but for other reasons. They may have been verbally threatened by their employer; they may not have been threatened but have assumed that if they were sued, they would lose due to the expense of defending themselves; in some cases they felt that they were under obligation to honor the agreement they had signed—no matter how overreaching it might have been.

Non-compete reform is not just about protecting workers; it is also about growing the economy. Some will say it is impossible to operate their business without non-competes. Perhaps it is easier not to worry about people leaving, but one need look no further than California’s Silicon



Valley or the San Diego biotech cluster for proof that a thriving economy does not depend on non-competes. Non-competes have been banned in California for more than 100 years. Again, I acknowledge that as a manager life is easier when you can rely on employees not leaving for rivals thanks to the non-compete they were required to sign. When I was managing a team of engineers in Boston, I never really worried about people quitting. Whereas when I managed a team in Silicon Valley, I realized that we as a company had to keep them engaged. We had a saying: “you never stop hiring someone.” I think it made us a better company, and it made me a better manager.

Non-competes hurt the economy because it is more difficult to start new companies and also to grow those companies. Professors Olav Sorenson of Yale University and Toby Stuart of the University of California at Berkeley published a study in 2003 showing that the spawning of new startups following liquidity events (i.e., IPOs or acquisitions) is attenuated where non-competes are enforceable. Professor Sorenson followed up this study with a more recent article, coauthored with Professor Sampsa Samila at the National University of Singapore. They show that a dollar of venture capital goes further in creating startups, patents, and jobs where non-competes are not enforceable. Their finding is moreover is not just a Silicon Valley story but holds when Silicon Valley is excluded entirely.

Non-competes not only make it more difficult to start a company; they make it harder to grow a startup. One of the randomly-selected interviewees in my American Sociological Review article said that he “consciously excluded small companies because I felt I couldn’t burden them with the risk of being sued. [They] wouldn’t necessarily be able to survive the lawsuit whereas a larger company would.” Also, whereas large companies are able to provide a holding-tank of sorts for new hires to work in a different area while waiting for the non-compete to expire, this is more difficult for smaller firms.

Finally, and perhaps of even greater concern, is that non-competes chase some of the best talent out of a region. I have included my research on a 1985 change in public policy in Michigan to start enforcing noncompetition agreements. My research indicated that the change accelerated the emigration of inventors from the state and moreover to other states that continued not to enforce non-compete agreements. This finding is not simply an artifact of the automotive industry or general westward migration; in fact, it is robust to a variety of tests including pretending that the policy change happened in Ohio or other nearby, mid-sized Midwestern states. Worse, this “brain drain” due to non-compete agreements is greater for the most highly skilled workers. It stands to reason that a change in public policy like SB 1279 SD1 would promote the retention of top talent in Hawaii.



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From: [Scot Robertson](#)
To: [JDL Testimony](#)
Subject: Non-Compete Bill
Date: Thursday, March 19, 2015 10:52:45 AM

Hi,

I am a high tech working in the semiconductor industry. With a career of 32 years, I have seen much change in the industry. My career has moved from long term employment at large companies (20 years) to, over the last ten years, short term employment at small and start-up companies (typically 1-3 years). I am in a permanent search for jobs and have had to move across the United States twice to stay employed. A major obstacle for me to stay employed has been non-compete agreements. I have signed these at three companies to get the severance I deserve, and desperately needed, after being laid off due to company business changes. I understand the importance of IP to companies so I understand their motivation for non-competes. Also, many of the investors in the companies I have worked for require the start-up to use non-compete agreements. The fundamental problem is that as an experienced tech worker, companies will ONLY hire me to do the EXACT same work I was doing at my previous company. Specifically, I must use my specific knowledge of technology, vendors, and customers to qualify for the new job. Employers aren't willing to pay me while I am trained, or self-trained, on a new technology or market. This puts me in the position of risking violation of my non-compete agreement. As a result, I have had to live with the threat of potential financial ruin should a former employer decide to prosecute me. Please pass and enact **bill HB1090 to provide me and thousands of other technology workers like me safe harbor from the threat of lawsuits by former employers.**

BR,

Scot

Scot Robertson